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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ROBERT R. HENN, J. ROBERT KELLY, ROBERT W. HORAN and RICHARD H. LEHMAN,

Petitioners,

vs.

NATIONAL GEOGRAPHIC SOCIETY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals err:

(1) In asserting (read either as a categorical principle of law, or as a presumption) that—

(a) "an early retirement package is a boon" (819 F.2d at 828, App. A-6);

(b) an "offer of early retirement is beneficial to the recipient" (819 F.2d at 828, App. A-5);

(c) "early retirement benefits [are] favors to older employees, about which they cannot complain" (819 F.2d at 827, App. A-5);

(2) in holding that it is a *sine qua non* to a finding that a constructive discharge has occurred that it be shown "that the plaintiffs would have been fired (in violation of the ADEA) had they turned down the offer of early retirement" (819 F.2d at 830, App. A-11);

(3) in holding that "*the* appropriate question in early retirement cases [is] whether the existing conditions (ignoring the offer of early retirement) violate the ADEA" (emphasis added) (819 F.2d at 829, App. A-8);

(4) in holding that the petitioners here "could prevail only by showing that the Society manipulated the options so that they were driven to early retirement not by its attractions but by the *terror* of the alternative" (emphasis added) (819 F.2d at 829, App. A-8);

(5) in stating as a principle of law that "[i]f the Society could have discharged them lawfully . . . then the fact that it may have discharged them 'constructively' instead would be unimportant" (819 F.2d at 829, App. A-8); and

(6) in failing to consider and assess all, and as a whole, the relevant and material evidence of record bearing upon the issues of the respondent's (a) discriminatory predilection or motivation, (b) pretextual explanations, and (c) "constructive discharge" of the petitioners, and to view all reasonable inferences from the record in the light most favorable to the petitioners, as required by Rule 56(c) of the Federal Rules of Civil Procedure and applicable decisions of this Supreme Court.

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Petitioners, Robert R. Henn, J. Robert Kelly, Robert W. Horan and Richard H. Lehman, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on May 29, 1987.

REPORT OF OPINION OF COURT OF APPEALS

The Opinion of the Court of Appeals is reported at 819 F.2d 824.

GROUNDS ON WHICH THE SUPREME COURT'S JURISDICTION IS INVOKED

The Judgment and Opinion of the Court of Appeals was entered on May 29, 1987,[1] affirming two judgments entered by the United States District Court for the Northern District of Illinois, Eastern Division, on March 12, 1986,[2] and September 2, 1986.[3] The petitioners' petition for rehearing and suggestion of rehearing en banc was filed on June 22, 1987 and was denied on July 2, 1987.[4] This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

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[1] The Opinion of the Court of Appeals is printed as Appendix A hereto.

[2] The Judgment of the Court of Appeals is printed as Appendix B hereto.

[3] The Memorandum Opinion and Order of the District Court dated March 12, 1986 is printed as Appendix C hereto. That Court's Memorandum Opinion and Order dated September 2, 1986 is printed as Appendix D hereto.

[4] The Order of the Court of Appeals denying the petitioners' petition for rehearing and suggestion for rehearing en banc is printed as Appendix E hereto.

STATUTE AND RULE INVOLVED

Age Discrimination In Employment Act Of 1967, as amended, 29 U.S.C. § 621-634

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of his employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

. . . .

(f) Lawful practices; age an occupational qualification; other reasonable factors; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is

not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual;

(3) to discharge or otherwise discipline an individual for good cause.

. . . .

Federal Rule of Civil Procedure

Rule 56. Summary Judgment.

. . . .

(c) . . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

. . . .

STATEMENT OF THE CASE

The case was brought in the United States District Court for the Northern District of Illinois, Eastern Division, by the petitioners, four individuals who had previously been employed as executives in the Advertising Division of the respondent, National Geographic Society. The jurisdiction of the District Court was based on the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621, *et seq.*, ("ADEA"), §16(b) of the Fair Labor Standards Act of 1938, 29 U.S.C. §216(b) ("FLSA"), and 28 U.S.C. ¶1331. The suit was initiated by the petitioner

Henn. Petitioners Horan, Kelly and Lehman joined in the action pursuant to consents filed under §16(b) of the FLSA.

The action was filed on June 18, 1984. The respondent filed its answer on July 11, 1984, and, on January 31, 1985, its motion for summary judgment against (a) Henn and Kelly, on the ground that they failed to establish a prima facie case of age discrimination, and (b) all four plaintiffs, on the ground that they were equitably estopped from complaining because of their acceptance of early retirement. On March 12, 1986, the District Court granted summary judgments in favor of the respondent and against Henn and Kelly, except it denied the respondent's motion insofar as it was based upon equitable estoppel. Henn and Kelly filed their notice of appeal. On April 18, 1986, the Court of Appeals, on the ground that the judgments were not final, dismissed Henn's and Kelly's appeals. Previously, on April 2, 1986, the respondent had filed its second motion for summary judgment against Lehman and Horan. On September 2, 1986, the District Court granted the respondent summary judgments against Horan and Lehman. On October 1, 1986, petitioners filed their notice of appeal in the Court of Appeals, and the proceedings to which this petition relates followed.

The gravamen of the petitioners' case is that as a prelude to the respondent's offer of its early retirement program, and continuing thereafter, they were subjected to unremitting and unwarranted denigrations, public and other humiliations, actual and scarcely-veiled threats, and other such actions, on the part of the respondent. They assert that those actions were calculated to their demoralization, the destruction of their roles and relations within the respondent's organization, and the cessation of their ability to work in an untainted atmosphere, and that the

terminations of their employment constituted constructive discharges, all in violation of the ADEA.[5]

The essential background of the case may be simply stated. Two of the petitioners were salesmen, one was the (non-selling) manager of the respondent's Chicago, Illinois advertising-sales office, and one was involved in providing sales-assistance services to the respondent's salespeople. The respondent's Advertising Division was weighted heavily with persons of over 55 years old, and in the first half of 1983 the respondent decided to trim the staff of that Division. It chose as its vehicle an early retirement plan for those 15 members of its Advertising Division staff who were over age 55. The petitioners were within that older group. They, with 12 others, accepted the package on or before the September 1, 1983 deadline set by the respondent. The petitioners are not aware of precisely why, or in what totality of circumstances, the other accepting offerees chose to opt out. Their complaints are addressed to the actions of the respondent as they were affected, personally, against the back-drop of nascence of and circumstances attending the implementation of the respondent's early-retirement program.

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[5] Because the numerous specifics of the actions of the respondent defy recital in a "*concise*" statement of the case, but which specifics the petitioners believe are important for the Supreme Court's consideration of their petition, copies of their briefs to the Court of Appeals are appended as Appendices F and G, solely for their record references as to facts, not for any arguments which they contain.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

I.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH OTHER FEDERAL COURTS OF APPEAL, AND THIS SUPREME COURT, IN THAT IT MARKS A DRAMATIC DEPARTURE FROM STANDARDS LONG APPLIED WITH RESPECT TO RULE 56, F.R.C.P.

The Supreme Court has long admonished that a court has a very limited function in addressing a motion for summary judgment under Rule 56. Its role is solely to determine whether a genuine issue as to any material fact exists, not to resolve or determine any such issue. *United States v. Diebold, Inc.*, 369 U.S. 654 (1962). The Court has further consistently stated: "[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Diebold, supra*, 369 U.S. at 655. The Rule should be used with great hesitancy to deny a plaintiff resort to trial by jury, particularly where issues of intent or credibility are involved. See *Sartor v. Arkansas Nat. Gas Corp.*, 321 U.S. 620, 628 (1944).

Employment discrimination cases frequently, as does this case, involve "sensitive and difficult" issues of fact. See *U.S. Postal Service v. Aikins*, 460 U.S. 711, 716 (1983). They frequently defy "paper trial", which denies to a trier of fact an opportunity to view, hear and assess the credibility of witnesses. No document or transcript can ever convey the full flavor of a witness' sincerity or prejudice, nor reveal the nuances and meanings discernable when a witness is on the stand. That can only be had at trial, and is especially critical in discrimination

cases where a plaintiff's hard-found evidence may indeed be only circumstantial as it bears on motive. See *Cuddy v. Carmen*, 694 F.2d 853, 859 (D.C. Cir. 1982).

Summary judgment is, of course, not a "disfavored" procedural shortcut (*Celotex Corp. v. Catrett*, ____ U.S. ____, ____, 106 S.Ct. 2548, 2555 (1986)), but it is nevertheless fundamental "that at the summary judgment stage the judge's function is not to weigh the evidence and determine the truth of the matter." *Anderson v. Liberty Lobby, Inc.*, ____ U.S. ____, ____, 106 S.Ct. 2505, 2511 (1986). In this case the petitioners submit that if there is one thing manifest on the face of the decisions of the District Court,[6] it is that that Court undertook to "weigh" and "determine", and in that the Court of Appeals concurred. Moreover, as those decisions reveal, the Courts below viewed every inference from the record in the light most favorable to the movant-respondent.[7]

The Federal Rules are all collectively, and properly, designed "to secure the just, speedy and inexpensive deter-

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[6] Appendices C and D hereto. (References to Appendices: App. ____)

[7] This is not a case where the range of permissible inferences might be deemed limited by the statute being applied. See *Matsushita Elec. Indus. Co. v. Zenith Radio*, ____ U.S. ____, 106 S.Ct. 1348 (1986). Nor is it a case where this Court has established as a matter of substantive law, for the protection of a particular class or principle, a special standard governing the quantum or quality of proof necessary to support liability. See *Anderson, supra*, ____ U.S. ____, 106 S.Ct. 2505. Indeed, given the broad remedial purpose of the ADEA, to protect employees at perhaps the most economically vulnerable time in their lives, in a relationship already marked by their relative vulnerability, a greater latitude is appropriately demanded. See Public Papers of the Presidents of the United States—Lyndon B. Johnson, 1967, Book I, at 32, *et seq.* (G.P.O. 1968), for the need for the ADEA's protections.

mination of every action." *Celotex, supra,* ____ U.S. at ____, 106 S.Ct. at 2555. But that expression of general purpose should not be permitted to obliterate the specific stricture under Rule 56 that a judge is strictly limited to inquiring as to whether it is possible for a fair-minded jury, hearing and reading all the evidence, to return a verdict for the non-moving party. See *Anderson, supra,* ___ U.S. at ____, 106 S.Ct. at 2512.

The Court of Appeals here (quite apart from the substantive early retirement/constructive discharge hurdles it places in an employee's path) established a standard by its example for the quantum and quality of proof under Rule 56 in early retirement/constructive discharge cases which separates it materially, no, essentially, from other Courts of Appeal. Illustratively, see *Downey v. Southern Natural Gas Company,* 649 F.2d 302, 305 (5th Cir. 1981):

> "We have recently reviewed the law on constructive discharge in *Bourque v. Powell Electric Manufacturing Co.,* 617 F.2d 61, 65 (5th Cir. 1980). Essentially, the test is whether a reasonable person in the employee's position would have felt compelled to resign. *Downey asserts that his superior specifically advised him that he might be discharged with a consequent loss of benefits. We regard that testimony as sufficient to create a contested issue of material fact regarding constructive discharge. A reasonable person might well feel compelled to resign in the face of such a statement.* We reverse the grant of summary judgment on this issue and remand." (emphasis added).

It need not be held that summary judgment is necessarily *improper* where the issue is constructive discharge, but it is a markedly different matter to brush aside a record replete with evidence of threats and demoralizations with the almost off-handed observation that fear is merely something that goes with the petitioners' territory, as the

District Court did in this case.[8] That attitude suggests, and resulted in, an evidentiary quantum and quality standard in cases such as the one at bar which is light years beyond *Downey, supra,* and virtually beyond reach.

It is not necessary, however appealing it is to the petitioners, for a court to hold that *every* retirement under an early retirement plan creates a prima facie case or is presumptive of age discrimination, as the Second Circuit held initially in *Paolillo v. Dresser Industries, Inc.*, 813 F.2d 583 (2d Cir. 1987) (advance sheets).[9] The Court of Appeal's decision in this case, however, in recoiling from the initial *Paolillo* rule, articulated standards for assessing early retirement/constructive discharge cases which renders it impossible, absent a showing of "terror",[10] for an employee ever to get his case to a jury.

The decision of the Court of Appeals in this case represents a complete inversion of the principles applicable to Rule 56, and calls for a delineation by the Supreme Court of standards by which aggrieved employees might realistically endeavor to seek and secure redress for the wrong of constructive-discharge retirements.

It is submitted that the simple, straight-forward approach of the Second Circuit, upon rehearing of *Paolillo* (821 F.2d 81), represents a proper application of Rule 56.[11]

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[8] As the District Court concluded: "[just] a normal concern of this type of profession, which has never been characterized as a bed of roses." App. D-4.

[9] That view is more in accord with the real world, wherein the happy "voluntary" early-retiree is more often than not a fiction, but a fiction in which both employer and employee may find some conscience or psyche assuagement.

[10] The Court's word. 819 F.2d at 829, App. A-8.

[11] And as reflected in such cases as *Downey, supra.*

That is, what is required is that a record show evidence of "pressure". Although the employer "may ultimately be successful on the issue of whether appellants in fact acted voluntarily, . . . that must be decided at trial when the trier of fact can make credibility determinations, not on a motion for summary judgment." *Paolillo, supra,* 821 F.2d at 85.

This is an important issue, and needs for its clear and definitive resolution reinforcement by the Supreme Court of the proper role of courts in addressing motions for summary judgment in early retirement/constructive discharge cases under the ADEA.

II.

THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN HOLDING THAT "THE APPROPRIATE QUESTION IN EARLY RETIREMENT CASES [IS] WHETHER THE EXISTING CONDITIONS (IGNORING THE OFFER OF EARLY RETIREMENT) VIOLATE THE ADEA."

The Court of Appeals held that "*the* appropriate question in early retirement cases [is] whether the existing conditions (ignoring the offer of early retirement) violate the ADEA."[12] That is clear error. If a court approaches an ADEA early retirement/constructive discharge case by assessing first the existing conditions and at that point ignoring the offer of early retirement, then there are *two* questions. First, are the existing conditions such as would justify opting out, with a resultant "constructive discharge" being effected? Second, was the purpose or, more precisely, the consequence of the employer's creation of such conditions the forcing into early retirement of his older workers so as to be violative of the ADEA? A reading

[12] 819 F.2d at 829, App. A-8 (emphasis added).

of just the existing conditions (e.g.—demoralizing actions) would not by itself lead a court to conclude one way or another whether the ADEA had been violated. It is only when that ambiguity is illuminated by the fact that there is an offer of early retirement on the table that the necessary nexus between the coercive conduct and age discrimination can be seen. In short, only by *not* ignoring the offer of early retirement can it be said that the existing conditions go to demonstrating a violation of the ADEA in an early retirement case.

On the contrary, the Court of Appeals would require an artificial separation of the two essential factors (employer's actions and the early retirement offer), and would demand that the employee show a violation of the ADEA at the conclusion of his demonstration of the first such element of the offense. A showing of just "existing conditions" will not answer the critical question "why." The Court of Appeals has said the evidence as to "why" (i.e.—early retirement acceptance) is not a part of "the appropriate question" as to whether the ADEA has been violated. It is wrong. The proper question is whether, given the *totality* of relevant facts, there is evident a violation of the ADEA.

III.

THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN HOLDING THAT A FINDING OF CONSTRUCTIVE DISCHARGE IS DEPENDENT UPON A JURY'S INFERRING THAT AN EMPLOYEE WOULD HAVE BEEN FIRED IN VIOLATION OF THE ADEA HAD HE REJECTED EARLY RETIREMENT.

The Court of Appeals held that:

> "The reasonable inferences from this record would not allow a jury to infer that the plaintiffs would

> have been fired (in violation of the ADEA) had they turned down the offer of early retirement, *and without such a constructive discharge they cannot undo their choice to retire.*"[13]

The Court of Appeals demands that a constructively-discharged employee be able to prove to a jury, *after* he had "retired", what would have happened to him (fired) had he not left.[14]

It is respectively urged that while a plaintiff should have the burden of showing what did happen, he should not be expected in this world to prove what would have happened, but for.

The rule, as enunciated by the Court of Appeals would serve as an absolute bar to a jury's finding of constructive discharge where they were persuaded (that is, could speculate) that an employee would have been subjected to ongoing mistreatment into the future, but that he might not have been subsequently fired in violation of the ADEA.

The Court of Appeals does not merely demand that members of a jury be seers. It goes further. It requires that the jury infer a "but for" conclusion based on a contrary-to-fact condition.

The Court of Appeals has erected a barrier which cannot be breached.

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[13] 819 F.2d at 830, App. A-11 (emphasis added).

[14] At the summary judgment stage, he must adduce sufficient evidence to support an inference as to what might have (no what *would* have) happened to him, based on the hypothesis that he had not left his employment.

IV.

THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN HOLDING CATEGORICALLY THAT EARLY RETIREMENT BENEFITS ARE A BOON TO EMPLOYEES, ABOUT WHICH NO COMPLAINT CAN BE VOICED.

The Court of Appeals, in statements which read as propositions of law or at least as enunciations of near-conclusive presumptions, expressed its unequivocal opinion that any early retirement offer or package is a blessing:

> "These courts[15] treated offers of early retirement benefits in the way we have found natural—as favors to the older employees, about which they cannot complain."[16]
>
> . . . . .
>
> "[T]he fact [is] that the offer of early retirement is beneficial to the recipient. . ."[17]
>
> . . . . .
>
> "[A]n offer of incentives to retire, is a benefit to the recipient. . ."[18]
>
> . . . . .
>
> "[A]n early retirement package is a boon. . . ."[19]

The Court of Appeal's reliance upon *Gray, Coburn,* and *Diamond, supra,* is, first of all, misplaced. They do not stand for the proposition as expressed by the Court of

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[15] Referring to *Gray v. New England Telephone & Telegraph Co.*, 792 F.2d 251 (1st Cir. 1986) ("*Gray*"); *Coburn v. Pan American World Airways*, 711 F.2d 339 (D.C. Cir. 1983) ("*Coburn*"); *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66 (6th Cir. 1982) ("*Diamond*").

[16] 819 F.2d at 827, App. A-5.

[17] 819 F.2d at 828, App. A-5.

[18] 819 F.2d at 828, App. A-6.

[19] 819 F.2d at 828, App. A-6.

Appeals. If anything, those cases serve to highlight the vast differences in views of early retirement had by the Seventh Circuit and other Circuit Courts.

In *Gray*, the D.C. Circuit Court, after first finding—

> "The record shown *only* that MIPP was a voluntary, early-retirement program. The record is *devoid* of evidence that the program was used by NET to force older employees out of the company or that this program was used to force Gray out of the company, in this particular case. . . . ,

concluded that:

> *Absent evidence of illegal discrimination, the ADEA does not prohibit the formulation of such voluntary plans.*" (emphasis added) 792 F.2d at 255.

As for *Coburn*, that case did not involve an individual who had been offered an early retirement plan. There, Pan Am had undertaken an across-the-board reduction-in-force. Coburn, age 43, was terminated under that reduction-in-force plan, based on performance and other criteria. That plan had even been weighed in favor of employees over-40, by giving them additional credits in their evaluations. With respect to the early retirements of some other employees which apparently accompanied the company's overall cut-backs, there was no evidence presented of any discrimination, only Coburn's express suspicions. The Court, clearly influenced by the total absence of *mala fides* on the part of the company in any regard (it affirmed the trial court's grant of judgment n.o.v. in favor of Pan Am), merely stated in rejecting the evidentiary value of *suspicions*:

> "Coburn finds suspicious Pan Am's attempt to induce managers aged 55-65 to retire early. Early retirement is a common corporate practice utilized to prevent individual hardship. It is a humane practice well

accepted by both employers and employees, and is purely voluntary." 711 F.2d at 344 (dicta).

Diamond, unlike *Coburn*, at least dealt with an employee's early retirement. Ackerman had been given a chance to take early retirement when his job had been eliminated. He was clearly treated gently, even indulgently. His excessive and on-the-job drinking was noted. 670 F.2d at 68. The court found that "Ackerman has produced *no evidence* other than his 'conclusory allegations'." 670 F.2d at 70. Even Ackerman stated that "he thought a personality conflict was the basis for the decision [to eliminate his job]." 670 F.2d at 70.

The singular thing that can be said about *Coburn* and *Diamond*, and for that matter *Gray*, is that they most assuredly do not stand for the categorical claim "that an early retirement package is a boon".[20]

It is submitted that whether early retirement is, in a given case, a boon or a bane is an issue of fact, the resolution of which would require an evaluation and weighing of all the relevant circumstances. It is an issue for a trier of fact, which, in an ADEA case, might (but not necessarily) bear upon the basic issue of constructive discharge.[21]

It is respectfully urged that the Supreme Court reject the proposition asserted by the Court of Appeals, that in early retirement/constructive discharge cases "an early retirement package is a boon."

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[20] 819 F.2d at 828, App. A-6.

[21] The most generous of economic packages might well not deny to an employee a valid claim of constructive discharge, when he really wanted merely to work. The benefits of work in an occupation or profession cannot be measured solely by money.

V.

THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN HOLDING THAT PETITIONERS MUST SHOW THEY WERE DRIVEN TO EARLY RETIREMENT BY THE TERROR OF THE ALTERNATIVE.

The Court of Appeals held:

> "They [the petitioners] complain that they felt pressure and perceived the choice to be excruciating, but that is not important. They could prevail only by showing that the Society manipulated the options so that they were driven to early retirement not by its attractions but by the terror of the alternative."[22]

In raising the standard for determining whether an employee's opting-out constitutes a constructive discharge to whether that person has been reduced to a state of "terror", the Court of Appeals has thrust into an already crowded constructive-discharge potpouri[23] not only another standard, but one so excessively onerous as to require the demonstration of savagery. Merely "excruciating" won't do.

In so holding, the Court of Appeals has elevated its own previously-expressed standard ("unbearable"; see *Brown v. Brienen*, 722 F.2d 360, 365 (7th Cir. 1983)), far beyond any test for or definition of constructive discharge articulated by any court.[24]

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[22] 819 F.2d at 829, App. A-8.

[23] See for extended discussions: Larson, Employment Discrimination, Vol. 3, §86.50; *Bourque v. Powell Electric Manufacturing Co.*, 617 F.2d 61, 65 (1980); *Bernstein v. Consolidated Foods Corp.*, 622 F.Supp. 1096, 1101-1102 (N.D. Ill. 1984).

[24] The Court of Appeals declined to decide whether a plaintiff must also prove the employer's malevolent purpose (819 F.2d at 829, App. A-9), as a few courts have required. See footnote 23,

(Footnote continued on following page)

This is a matter which calls for its being settled by the Supreme Court. It is respectfully urged that the Supreme Court establish as the test of constructive discharge the clear and simple one which was quoted in *Bourque*, *supra*, 617 F.2d at 65:

> "To find constructive discharge we believe that 'the trier of fact must be satisfied that the . . . working conditions would be so difficult or unpleasant that a reasonable person would have felt compelled to resign.' "

However, whatever formulation might be deemed proper by the Supreme Court, it is submitted that the standard adopted by this Court of Appeals is without basis and should be rejected.

VI.

THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN HOLDING THAT IF THE RESPONDENT COULD HAVE FIRED THE PETITIONERS LAWFULLY, ITS CONSTRUCTIVE DISCHARGE OF THEM WOULD BE UNIMPORTANT.

The Court of Appeals held:

> "If the Society could have discharged them lawfully—perhaps because business had turned sour, and these four were not selling enough[25] to cover their wages—then the fact that it may have discharged them 'constructively' instead would be unimportant."[26]

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[24] *continued*
supra. However, if a plaintiff must prove he was terrorized, at that point one might assume that proof of purpose or intent on the part of the employer could be read into any terror-inducing evidence.

[25] See footnotes 31-33, *infra*.

[26] 819 F.2d at 829, App. A-8.

As a principle of law, applicable to and within the context of this or any early retirement/constructive discharge case, it is flat wrong. As an exercise in (non-applicable) abstraction it has some virtue if, and only if, the Court of Appeals had phrased the concluding portion of that statement to read:

> ". . . then the fact that it may have discharged them 'constructively' instead, *for a lawful reason*, would be unimportant."

Without that necessary qualification, the Court of Appeals is saying that so long as an employer could have lawfully discharged an employee he is permitted to constructively discharge that person without qualification for any reason. Since an employer has always a legitimate basis for firing employees (absent contract, proscribing statute, overriding public policy, etc.),[27] it is the fact that "the Society could have discharged them lawfully" that is unimportant, and begs the issue. The issue here is based upon what the respondent did do, not what it *could have* done, and is whether what it did do violates the ADEA. An employer cannot, after having unlawfully constructively discharged an employee, claim exemption on the ground that his performance would have warranted his discharge in the first place.

The effect of the Court of Appeal's assertion would be to place upon the at-will employee the practically and legally impossible burden of showing that his employer could not have fired him lawfully. That clearly has no place under the law.

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[27] As one court put it, an employee may be fired for "a good reason, a bad reason, a mistaken reason, or no reason at all." *Grier v. Casey*, 643 F.Supp. 298, 308 (W.D. N.C. 1986), and cases cited.

VII.

THE COURT OF APPEALS ERRED AS A MATTER OF LAW AND IN DEROGATION OF RULE 56 IN FAILING TO CONSIDER AND PROPERLY ASSESS ALL OF THE EVIDENCE BEARING UPON THE RESPONDENT'S VIOLATION OF THE ADEA.

In characterizing the petitioners' case, the Court of Appeals described them as complaining only about "two things that made their positions untenable: the 'silent treatment' and threats (real and implied) of unpleasant consequences if they did not start selling more ads."[28]

This petition would be unduly burdened by a reiteration of all of the evidentiary bases for the petitioners' complaints. It is critical that at least an overview of the quantum and character of such evidence be had, for the Court of Appeals, and the District Court erred grievously in their respective assessments of that evidence.[29] An extended discussion is not demanded, for the Courts below manifestly understated and seriously misstated the petitioners' evidence. There were more than "two things", and the particular shading given the matter of "selling more ads", for example, is simply wrong.

The Court of Appeals emphasized that: "all four were producing less than their [sales] quota."[30] To the contrary, one of the petitioners (Kelly) was not even involved in selling,[31] another (Lehman) described 1983 as a "gangbusters" year in which he made his quota,[32] and a third

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[28] 819 F.2d at 829, App. A-9.

[29] For convenient and useful reference, certain abbreviated evidentiary extracts are appended at App. F-1 through F-14, App. G-1 through G-2.

[30] 819 F.2d at 830, App. A-10.

[31] App. F-6.

[32] App. F-10.

(Henn, the respondent's non-selling Chicago office manager) was so lacking in fear that he offered to stay on in a selling role if the respondent would let him.[33]

That example is not inconsequential. The Court of Appeals repeatedly refers to inadequate sales and sales-related fears as supportive of the District Court's conclusions in favor of the respondent.[34]

It is submitted that not just in this specific but generally, the District Court and the Court of Appeals erred fundamentally in applying Rule 56.

Under any fair reading of that Rule, and the decisions of the Supreme Court interpreting it and delineating its application, it is incumbent upon courts to arrive at a determination based on a full and accurate view of the evidence. Then, having done so, from the material evidence a court must draw all reasonable inferences in favor of the non-moving party. The Courts below failed on all counts.

CONCLUSION

For all of the above reasons, the petitioners pray that a writ of certiorari issue to review the judgment and opinion in this case of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

WILFRED F. RICE, JR.
Attorney for Petitioners

[33] App. F-5.

[34] 819 F.2d at 826, 829, 830, App. A-2, A-9, A-10.

INDEX TO APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 86-2635

ROBERT R. HENN, et al.,

Plaintiffs-Appellants,

v.

NATIONAL GEOGRAPHIC SOCIETY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 5125—**Harry D. Leinenweber**, *Judge.*

ARGUED APRIL 10, 1987—DECIDED MAY 29, 1987

Before BAUER, *Chief Judge,* and POSNER and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Experiencing a decline in advertising, the National Geographic Society decided to reduce the number of employees selling ads. The Society offered every ad salesman over age 55 the option of early retirement. The Society made the offer in June 1983; the recipients had more than two months to think it over. The Society offered: a severance payment of one year's salary, retirement benefits calculated as if the retiree had quit at 65, medical coverage for life as if the employee

were still on the payroll, and some supplemental life insurance coverage. The letter extending the offer stated that this was a one-time opportunity. Twelve of the fifteen recipients took the offer; the three who declined are still employed by the Society. All twelve have received the promised benefits. Four of the twelve filed this suit, contending that their separation violated the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34.

The district court granted summary judgment to the Society. It concluded that early retirement violates the ADEA only if the alternative is "constructive discharge"—that is, working conditions so onerous or demeaning that the employee has effectively been fired in place and compelled to leave. See *Bartman v. Allis-Chalmers Corp.*, 799 F.2d 311, 314 (7th Cir. 1986); *Brown v. Brienen*, 722 F.2d 360, 365 (7th Cir. 1983). The court thought it undisputed that plaintiffs' working conditions were unchanged from what they had always been; there was pressure to perform and dark hints that failure to sell more ads would have unpleasant consequences, but the judge concluded that these went with the territory. Each person's decision to retire was his own, and any pressure he felt was the product of the downturn in sales and the risks of a salesman's job.

The plaintiffs' brief on appeal is principally devoted to insisting that there was enough evidence of constructive discharge to require a trial. The case has been complicated, however, by *Paolillo v. Dresser Industries, Inc.*, 813 F.2d 583 (2d Cir. 1987), which holds that *every* retirement under an early retirement plan creates a prima facie case of age discrimination, and that the employer must show both that the details of the plan have solid business justification and that each decision to retire is "voluntary"—by which the Second Circuit apparently meant "without undue strain". If *Paolillo* correctly interprets the ADEA, this case must be tried. We conclude, however, that the parties and the district court, rather than *Paolillo*, took the right approach. Only a constructive discharge, where an actual discharge would violate the ADEA, supports a claim of the sort plaintiffs pursue.

To determine the proper treatment of early retirement, we start by assuming that the employer is complying with the ADEA. (Whether the Society was doing so is a question to which we return.) Now the employer adds an offer of early retirement. Provided the employee may decline the offer and keep working under lawful conditions, the offer makes him better off. He has an additional option, one that may be (as it was here) worth a good deal of money. He may retire, receive the value of the package, and either take a new job (increasing his income) or enjoy new leisure. He also may elect to keep working and forfeit the package. This may put him to a hard choice; he may think the offer too good to refuse; but it is not Don Corleone's "Make him an offer he can't refuse." "Your money or your life?" calls for a choice, but each option makes the recipient of the offer worse off. When one option makes the recipient better off, and the other is the status quo, then the offer is beneficial. That the benefits may overwhelm the recipient and dictate the choice cannot be dispositive. The question "Would you prefer $100,000 to $50,000?" will elicit the same answer from everyone, but it does not on that account produce an "involuntary" response.

Section 4(a)(1) of the ADEA, 29 U.S.C. §623(a)(1), makes it unlawful to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age". Because an offer of early retirement is valuable, the sort of thing many people would pay to receive, it might be thought to "discriminate against" those who do not get the offer. But people under 40 are not protected by the ADEA, 29 U.S.C. §631(a), and some distinctions within the group of employees 40 and over are allowed by §4(f)(2), which permits an employer "to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of [the ADEA]". This section allows distinctions to be drawn on account of age when, for example, calculating insurance

premiums. The employer may charge older employees more for term insurance; the employer may offer lower monthly payments to employees who retire early. Such plans have sound actuarial foundations, and §4(f)(2) permits their use. The employer also may make decisions based on seniority, even though seniority correlates with age. Several cases, including *Paolillo*, have assumed that an early retirement plan that excludes some people in the protected age group must be examined under §4(f)(2), which requires the employer to show both a sound business purpose for the structure of the plan and the absence of "subterfuge". E.g., *Cipriano v. Board of Education*, 785 F.2d 51 (2d Cir. 1986); *Patterson v. Independent School District*, 742 F.2d 465 (8th Cir. 1984). See also 29 C.F.R. §860.120(a)(1), discussing the function of §4(f)(2) and the burden it imposes on employers. (The legislative history of §4(f)(2) is discussed in *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1395-96 (9th Cir. 1984).)

Section 4(f)(2), however, is a defense. The employer need not mount a defense unless the employee makes out a prima facie case. An employee excluded from the early retirement plan (as in *Cipriano*, which excluded employees 60 and over), or treated adversely under it (as in *Patterson*, dealing with a plan whose benefits diminished with age), has stated a claim of discrimination. An employee to whom the offer has been extended—such as our four plaintiffs—is the beneficiary of any distinction on the basis of age. None can claim to be adversely affected by discrimination in the design or offer of the early retirement package. Cf. *Dorsch v. L.B. Foster Co.*, 782 F.2d 1421, 1427-29 (7th Cir. 1986). So in a suit by someone in the *favored* group, §4(f)(2) never comes into play.

Paolillo concluded, however, that retirement under an early retirement plan is a prima facie case of age discrimination against the person who retires. That forced the employer to rely on §4(f)(2), the Second Circuit believed, and it added an obligation that the employer not only justify the structure of its plan but also show that each decision to retire was "voluntary" in the sense of "without

undue mental strain". The court thought this a natural interpretation of *Cipriano*. It is not, because *Cipriano* dealt with people excluded from the plan. The discrimination against the plaintiff called for explanation; there was no similar discrimination against the plaintiff in *Paolillo*. The Second Circuit also disregarded several earlier cases that had held that early retirement is not the basis for an inference of discrimination. E.g., *Gray v. New England Telephone & Telegraph Co.*, 792 F.2d 251, 255 (1st Cir. 1986); *Coburn v. Pan American World Airways, Inc.*, 711 F.2d 339 (D.C. Cir. 1983); *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66 (6th Cir. 1982). These courts treated offers of early retirement benefits in the way we have found natural—as favors to the older employees, about which they cannot complain. See *Diamond*, 670 F.2d at 71 ("Diamond appears to have been rather generous with Ackerman. Rather than simply terminating him or switching him to a lower paying or less prestigious job, Diamond offered him an opportunity to retire with dignity."); *Coburn*, 711 F.2d at 344 (early retirement "is a humane practice" that "supports not a hint of age discrimination."). *Paolillo* created a conflict among the circuits.

In characterizing retirement under an early retirement program as presumptively discriminatory, *Paolillo* overlooked the regulation governing early retirement plans, 29 U.S.C. §1625.9(f). This provides: "Neither section 4(f)(2) nor any other provision of the Act makes it unlawful for a plan to permit individuals to elect early retirement at a specified age at their own option." This plausible construction of the ADEA is entitled to considerable weight where, as here, Congress never considered the matter. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984). The legislative history of the ADEA is unilluminating about early retirement plans. Given that, §1625.9(f), and the fact that the offer of early retirement is beneficial to the recipient, there is no reason to treat every early retirement as presumptively an act of age discrimination.

The "prima facie case" in the law of discrimination is a shorthand for the constellation of events that raises a suspicion of discrimination—enough so to require the employer to explain his conduct. See *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). When a court can identify some circumstances that "give rise to an inference of unlawful discrimination" (*Burdine*, 450 U.S. at 253) it may treat similar circumstances as creating a presumptive case of discrimination in the future. When similar circumstances would not support an inference, they should not be treated as a prima facie case of discrimination. *Mason v. Continental Illinois National Bank*, 704 F.2d 361, 364-66 (7th Cir. 1983). Retirement is an innocuous event, coming once to many employees and more than once to some. Retirement is not itself a prima facie case of age discrimination, not unless all separations from employment are. And as we have explained, an offer of incentives to retire early is a benefit to the recipient, not a sign of discrimination. Taken together, these two events—one neutral, one beneficial to the older employee—do not support an inference of age discrimination. We agree with *Coburn* and *Diamond* that an early retirement package is a boon; we therefore must disagree with *Paolillo*'s conclusion that early retirement presumptively establishes age discrimination.

What distinguishes early retirement from discharge is the power of the employee to choose to keep working. This must mean a "voluntary" choice. But what does "voluntary" mean? We could ask, as the court did in *Paolillo*, whether the employee had enough time to mull over the offer and whether the choice was free from "pressure". (In *Paolillo* the employees had less than a week, which the court thought suspiciously short.) Yet the need to make a decision in a short time, under pressure, is an unusual definition of "involuntary". A criminal defendant may be offered a plea bargain on a take-it-or-leave-it basis, knowing that if he does not act quickly the prosecutor may

strike a deal with another defendant instead; the need to act in haste does not make the plea "involuntary" if the defendant knows and accepts the terms of the offer. A suspect being interrogated may confess in a flash; his naiveté and the shortness of time do not make the confession involuntary. "Involuntariness" is a term of art dealing with certain tactics that the Constitution places off limits to interrogators. *Colorado v. Connelly*, 107 S. Ct. 515, 521-22 (1986). A commodities trader may have only seconds to buy or sell huge quantities in response to movements in price; neither the shortness of time nor the fear of financial loss would enable the trader to undo as "involuntary" choices that turned out, in retrospect, to be unhappy. An employee offered a new job with higher pay (good) in a new city (bad) may have only a short time to decide; neither the brevity of the time nor the difficulty of the choice makes the decision "involuntary".

The "voluntariness" question in these and many more examples of important choices turns on such things as: did the person receive information about what would happen in response to the choice? was the choice free from fraud or other misconduct? did the person have an opportunity to say no? A very short period to make a complex choice may show that the person could not digest the information necessary to the decision. This would show that the offer of information was illusory and there was no informed choice. But when the employee has time to consult spouse and financial adviser, the fact that he still found the decision hard cannot be decisive. A person contemplating an offer of early retirement may find the choice hard because *both* options—continued employment and early retirement—are desirable. The high value of each option hardly calls the voluntariness of the choice into question, however.

The plaintiffs in this case do not say that they lacked information about the terms of the offer. All had time to discuss the offer with families and financial advisers. They complain that they felt pressure and perceived the choice to be excruciating, but that is not important. They could

prevail only by showing that the Society manipulated the options so that they were driven to early retirement not by its attractions but by the terror of the alternative. If the terms on which they would have remained at the Society were themselves violations of the ADEA, then taking the offer of early retirement was making the best of things, a form of minimization of damages. Suppose, for example, that one of the plaintiffs expected to earn $200,000 in his remaining time at the Society, but the Society (in violation of the ADEA) had just cut his salary because of his age, so that he now could expect no more than $100,000. This employee would snap up an early retirement package worth $110,000, but might reject the same package had he been allowed to work at his old wage. (Whether he would take the package would depend on the earnings he could expect from other employment.) The decision to reduce one's injury from the employer's violation of the ADEA would not prevent a suit seeking to recover the remainder of the loss. But putting the point in this way reveals the appropriate question in early retirement cases—whether the existing conditions (ignoring the offer of early retirement) violate the ADEA. If they do, then the employee may recover for that violation whether or not he took the package of benefits (though the value of the package would be taken into account in computing damages).

The four plaintiffs set out to show that the Society had "constructively discharged" them by making their lives miserable, which induced them to take the offer. Showing this would not be enough. If the Society could have discharged them lawfully—perhaps because business had turned sour, and these four were not selling enough to cover their wage—then the fact that it may have discharged them "constructively" instead would be unimportant. A generous reading of the plaintiffs' papers treats them as maintaining that an actual discharge would have been unlawful.

The district court held that none of the four had been discharged, actually or constructively. "An employer con-

structively discharges an employee only if it '*makes* an employee's working conditions so intolerable that the employee is forced into an involuntary resignation' ". *Bartman*, 799 F.2d at 314 (emphasis supplied by *Bartman*; citations omitted). Some courts have added a requirement that the employer manipulate the attributes of the job for the purpose of driving the employee to quit. E.g., *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985). We need not decide whether to follow these decisions.

The plaintiffs complain of two things that made their positions untenable: the "silent treatment" and threats (real and implied) of unpleasant consequences if they did not start selling more ads. The "silent treatment" was principally that no one in the Society would tell them whether they ought to take the offer of early retirement; the Society says this was caused by its policy of sticking to the facts (doubtless to avoid charges of placing undue pressure on the employees), while the plaintiffs say that their inability to get straight answers about whether they should take the offer led them to fear the worst. The threats came about because all four plaintiffs had experienced bad years, and their supervisors told them they needed to sell more ads; this led them to fear for their jobs.

The record contains extensive admissions by the plaintiffs tending to support the district judge's conclusion that any threats made to these plaintiffs while they were considering the offer were no greater than justified by their lack of sales. Selling is a risky profession, and it does not make a salesman's job unbearable to remind him that he must produce and that there are penalties for failure. The plaintiffs say, however, that the Society's warnings were not justified on a more complete review of their performance. They also believe that the Society hassled them more than their sluggish sales performance warranted. To support this belief Henn states that Bill Hughes, his supervisor, said to him early in 1983: "[s]ome of you older guys will not be around at the end of the year". All four

plaintiffs rely on a passage in a memorandum that was part of the bureaucratic process that ended in the offer of early retirement: "Of the total twenty sales members one out of two are over 55 years, six are over age 62 and four are presently over age 65. [sic: actually 5 under 55; 5 between 55-61; 6 from 62-65; 4 over 65] Only one sales person over 65 plans to retire this year and an undetermined number desire to continue toward age 70. If an age balance is not struck soon our average age will obviously increase. Serious repercussions will result if younger sales personnel are not available to cultivate clients in new growth industries and insure future sales. To attract youthful qualified sales personnel we must be cognizant of industry practices and offer required incentives." The author of the memo recommended that salesmen be fired; the Society did not take that advice. It maintains that neither comment supports an inference that it acted or would have acted improperly to any person on the payroll.

The district court concluded that neither these nor other comments and incidents added up to constructive discharge or supported a reasonable belief by the plaintiffs that, had they remained at the Society, they would have been fired unlawfully. They were at risk of discipline or discharge for their performance (or lack of performance), and all four were producing less than their quota. The Society turned down the recommendation that it fire people, so the author of the memorandum did not speak for the Society. And although the record may well support an inference that the Society wanted to reduce the average age of its sales staff, this does not show that it used illegal means. Any early retirement program reduces average age, because only older employees are eligible to retire. That the Society favored the results of its program does not condemn the program. We passed that point when we accepted the conclusion of the EEOC, stated in 29 U.S.C. §1625.9(f), that early retirement programs do not violate the ADEA. See also *Kier v. Commercial Union Insurance Cos.*, 808 F.2d 1254, 1258 (7th Cir. 1987)

(the fact that a reduction in force reduces the average age of the remaining employees does not support an inference that a particular employee was fired because of age).

The argument based on constructive discharge depends not on the Society's beliefs about the effects of retirements but on what it communicated to the employees. The district court properly concluded that salesmen must endure adverse reactions and other signs of displeasure when their productivity falls off. An employer's communication of the risks of the job does not spoil the employee's decision to avoid those risks by quitting. Were it otherwise, any employee about whom there was dissatisfaction would have a jury case under the ADEA, even if the dissatisfaction were supported by objective indicators (such as low productivity). In passing on a motion for summary judgment, a court must indulge inferences in favor of the non-moving party, but it need not indulge all possible inferences. The reasonable inferences from this record would not allow a jury to infer that the plaintiffs would have been fired (in violation of the ADEA) had they turned down the offer of early retirement, and without such a constructive discharge they cannot undo their choice to retire.

One final matter. The plaintiffs' brief in this case was larded with citations to materials that were not before the district judge when he passed on the motion for summary judgment. The Society filed a motion to strike the offending material, to which the plaintiffs' counsel replied that it was proper to refer to depositions and the like—even without filing them in the district court or drawing the district judge's attention to them—when appealing from a grant of summary judgment. Counsel is wrong. See Fed. R. App. P. 10(a) (only materials filed with the district court are in the appellate record) and Circuit Rule 10 (same). The parties may rely on appeal only on materials furnished to the district judge. Otherwise they deprive the opposing party of an opportunity to comment on them and the district judge of an opportunity to eval-

uate their significance. Storing up depositions for use on appeal might produce unnecessary motion, if the materials would have persuaded the district judge (as the plaintiffs thought they would persuade us). Parties who designate and file parts of a deposition for a district judge's consideration must be aware that the remainder of the deposition is not in the record on appeal.

Instead of granting the motion to strike, we instructed counsel for the plaintiffs to file a new brief, shorn of the offending matter. Despite promising to furnish the brief promptly, counsel took 36 days after oral argument to do so. We were just about to strike all factual allegations in the original brief when the redacted brief appeared. Counsel who disregard the record and then tarry in making amends are playing with fire.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

JUDGMENT – ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 29, 1987.

Before

Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*

ROBERT R. HENN, et al.,

Plaintiffs-Appellants,

No. 86-2635 vs.

NATIONAL GEOGRAPHIC SOCIETY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84-C-5125—Harry D. Leinenweber, Judge.

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT R. HENN, ROBERT W. HORAN,
RICHARD H. LEHMAN and J. ROBERT KELLY,

Plaintiffs,

v.

NATIONAL GEOGRAPHIC SOCIETY,

Defendant.

No. 84-C-5125
Judge Leinenweber

MEMORANDUM OPINION AND ORDER

FACTS

The defendant, National Geographic Society ("Society"), on June 21, 1983, offered a special early retirement program to all employees in its advertising division over age 55. (#1)[1] Fifteen employees, including the four plaintiffs, were eligible. (#3) The program, which was expressly stated to be voluntary, provided enhanced retirement benefits, including (1) special supplemental payment of one

[1] #____ refers to Statement of Material Facts to which there is no issue which was attached to Society's Motion for Summary Judgment.

year's salary, (2) retirement benefits calculated without any acturial reduction for early retirement, and (3) extra medical and life coverage. (#2 and #4)

The only encouragement to acceptance was a September 1, 1983 deadline.

The plaintiff, as well as nine others, accepted the offer and retired from the Society, effective September 1, 1983. (#8) Three employees declined and are still employed by the Society. (#9) The Society has paid, and the plaintiffs have accepted, all of the benefits due under the early retirement program.

After these retirements the Society substantively reorganized its advertising sales offices in terms of staffing and responsibility. (#13)

Subsequently, the plaintiffs filed this action under §7(b) and (c) of the Age Discrimination in Employment Act ("ADEA") (29 U.S.C. §626(b) and (c) and §16(b) and (c) of the Fair Labor Standards Act, (29 U.S.C. §216(b) and (c)). Count I alleges that the activities of defendant constituted a "discrimination policy" against over-55 employees effecting discrimination against the plaintiffs in violation of §4(a)(1) and (2) of ADEA. (79 U.S.C. 623(a)(1) and (2). Count II, in the alternative, charges defendant with discrimination of the same provision of ADEA.

The defendant has moved for summary judgment on two grounds: first, with respect to plaintiffs, Henn and Kelly, for failure on their part to establish a prima facia case of age discrimination, and second, with respect to all four plaintiffs, equitable estoppel for ceasing work and accepting retirement benefits at cost to defendant on both monetary terms and significant staffing adjustments.

1. PRIMA FACIE CASE

LAW

An employee must have been discharged to state an ADEA claim arising from loss of job. U.S.C. §623(a)(1).

ADEA provides no protection from discrimination unless there has been some adverse employment action by the employer. The parties agree that where, as here, there has been no actual discharge, the plaintiffs must prove constructive discharge. *Bristow v. The Daily Press, Inc.*, No. 84-2021, slip op., p. 8-9 (4th Cir. 1985).

Constructive discharge occurs when an employer deliberately makes an employee's working conditions intolerable, forcing him to quit his job. *Ibid.*

Intolerability of working conditions, as the Circuits uniformly recognize, is assessed by the objective standard of whether a "reasonable person" in the employee's position would have felt compelled to resign. *Bourque v. Powell Mfg. Co.*, 617 F.2d 61 (5th Cir. 1980).

DISCUSSION

A review of the record in this case with regard to the claims of Henn and Kelly shows absolutely no evidence of "intolerability of working conditions" so as to justify any finding of constructive discharge.

The record does show that the year 1982 was a very poor one for the Society's advertising department (Request to Admit, Nos. 18 and 19).

It appears that at least, in part, the Society felt that this was a result of the "graying of its sales staff" and that it needed to reduce its staff and reorganize. (Plaintiff's exhibit 1, pp. 6-8) To achieve its purpose, the Society devised a program to encourage retirement. (Plaintiff's exhibit 2, p. 1) The inducement was the enhanced retirement package communicated to the over-55 employees by letter from the defendant's president, dated May 21, 1983. (Defendant's exhibit B)

Acceptance was voluntary and the three employees who chose not to accept early retirement continued working for the defendant. (#9) Plaintiffs agree that nothing was done by the defendant to encourage them to accept this offer except a "lack of encouragement from their superior"

not to accept it. (Answer to Request to Admit, #s 5, 117, 119, 128 and 129) In addition, it is reasonable to assume that the establishment of a "deadline" for acceptance can itself be considered "encouragement."

Plaintiff Henn's sole claim of intolerability of working conditions was his claim that he "wasn't wanted" and that "the pressure of trying to stay on would have been intolerable." (Henn's dep., p. 184) He based this on the failure of defendant to accept his offer to extend the early retirement offer 18 months in return for his promise of increased performance. (Henn's dep., pp. 183-184)

Plaintiff Kelly's claim of intolerability appears to have been based on his conclusion that the defendant was using reduced advertising sales as "a way of getting rid of some of the older people in the organization." (Kelly's dep., p. 123) His conclusion was reached because of what his boss was doing to some of the sales people.[2] (Dep., p. 141)

In conclusion, defendant's offer by its terms was voluntary; in actual practice it has proved voluntary in that the three employees who declined the offer are still employed; and, in fact, was a part of an overall reorganization of defendant's advertising sales force. (#13)

Both EEOC regulations (29 C.F.R. §1625.9(f)) and the case law (*Ackerman v. Diamond Shamrock Corp.*, 70 F.2d 66 (6th Cir. 1982) and *Toussaint v. Ford Motor Co.*, 581 F.2d 812 (10th Cir. 1978)) recognize the validity of voluntary early retirement.

The plaintiffs were salesmen, an occupation not known to be devoid of pressure of performance. Certainly plaintiffs may have been concerned that they might lose their jobs in the future based on performance criteria. Such concerns are far short of "intolerability of working conditions measured by any objective standard." *Johnson v. Bunny Bread,* 646 F.2d 1250, 1256 (8th Cir. 1981). On the other

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[2] The demotion appears to have been given to an employee under 55 years of age. (Kelly dep., p. 141)

hand, it certainly could seem reasonable to accept the certainty of enhanced retirement rather than accept the risk of job insecurity and regular retirement. Here the so-called "coercion" was considerably less than either *Ackerman* or *Toussaint.*

II. EQUITABLE ESTOPPEL

This court find that the remaining plaintiffs are not estopped from asserting their rights under ADEA merely because they have accepted the benefits of an allegedly discriminatory retirement program. The primary purpose of the ADEA is to promote employment of older persons based on their abilities rather than age, and to prohibit arbitrary age discrimination. *Hodgson v. First Federal Sav. & Loan Ass'n. of Broward County, FL.*, 455 F.2d 818 (C.A. Fla. 1972) The ADEA does not allow an employer to discriminate against its older employees so long as the employees are qualified to perform duties and responsibilities incident to their employers' functions. *Polstorff v. Fletcher*, 452 F. Supp. 17 (D.C. Ala. 1978), *Magruder v. Selling Areas Marketing, Inc.*, 439 F. Supp. 1155 (D.C. Ill. 1977). An employee must be permitted to assert his rights under the ADEA even if his employer has relied upon his unconditional acceptance of employer's discriminatory practices. Public policy prohibits discrimination on the basis of age and precludes accomplishment of such a result by an estoppel. *American Surety Company of N.Y. v. Gold*, 375 F.2d 523, 528 (10th Cir. 1966).

Accordingly, summary judgment is granted in favor of defendant and against plaintiffs, Henn and Kelly, but denied as to plaintiffs, Horan and Lehman.

IT IS SO ORDERED.

/s/ Harry D. Leinenweber
Judge, U. S. District Court

DATED: MAR 12 1986

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT R. HENN, ROBERT W. HORAN,
RICHARD H. LEHMAN and J. ROBERT KELLY,

Plaintiffs,

v.

NATIONAL GEOGRAPHIC SOCIETY,

Defendant.

No. 84-C-5125
Judge Leinenweber

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Originally, defendant, National Geographic Society ("Society"), moved for summary judgment against plaintiffs, Robert R. Henn ("Henn") and J. Robert Kelly ("Kelly"), on the twin grounds of failure to establish a prima facie case of age discrimination under the Age Discrimination Employment Act ("ADEA") (29 U.S.C. §621, *et seq.*) and equitable estoppel. Society at that time also moved for summary judgment against the plaintiffs, Robert W. Horan ("Horan") and Richard H. Lehman ("Lehman"), solely on the ground of equitable estoppel. The court granted summary judgment against Henn and Kelly for

failure to establish a prima facie case but denied the motion with respect to Horan and Lehman for the reason that public policy as expressed in ADEA precluded applicability of equitable estoppel (slip op., March 12, 1986).

Now Society moves for summary judgment against Horan and Lehman on the additional ground that they have failed to establish a prima facie under ADEA.

II. FACTS

The statement of general facts in this court's memorandum opinion of March 12, 1986 is the same for Horan and Lehman as it was for Henn and Kelly and, therefore, will not be repeated here (slip op., pp.1-2). Similarly, the statement of applicable law in the memorandum opinion is the same and will not be repeated (slip. op., p.3).

Horan and Lehman urge the court to deny the motion for summary judgment with respect to their cases without making any attempt whatsoever to distinguish their actual situations from those of Messrs. Henn and Kelly.

Horan urges the court to find "intolerability of working conditions" justifying a constructive discharge from the following facts: 1) his sudden demotion in January of 1982 from International Advertising Director to the sales staff; 2) assignment in 1982 of a large number of dead accounts; 3) a barrage of critical memoranda from his boss, Mr. Hughes ("Hughes"); 4) certain statements made by Hughes in early 1982 to a group of employees, including Horan; and 5) a "telling" silence from George Moffett ("Moffett"), Hughes' supervisor.

The "sudden demotion", however, was a result of job abolition and his transfer to the sales staff occurred without any loss of pay (¶¶96-97). The "dead accounts" assigned in 1982 were accompanied by a substantial reduction in Horan's sales quota. For example, his quota in 1981 was seven pages (¶92); in 1982 four pages (¶102); and in 1983 fifteen pages (¶104). There is no indication that the barrage of critical memoranda from his supervisor,

Hughes, was prepared with any age discriminatory intent, inaccurate or unwarranted because he failed to achieve any of the quotas set for the years 1981, 1982 and 1983 (¶¶93,103,110).

Finally, it can hardly be seriously contended that an employer commits a violation of ADEA by failing to urge a qualified employee to refuse to accept an early retirement offer made to cut staff. *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255-1256 (4th Cir. 1985) (where the court held that urging an employee to take early retirement did not amount to constructive discharge).

Lehman urges the court to find "intolerability of working conditions" justifying a constructive discharge from the following facts; 1) Hughes, also Lehman's boss, promoted one of Lehman's subordinates by communicating directly with him and, while visiting Lehman's offices, spent much of his time with this subordinate; 2) Hughes sent Lehman a warning about his sales performance and a memorandum indicating that his job was in jeopardy; 3) Hughes gave Lehman a "below average" performance evaluation at an "atypical time", immediately before the early retirement offer was made to the employees over 55 years of age; and 4) the apathy and silence on the part of Moffett and Gil Grosvenor ("Grosvenor"), Society President.

The promotion of Lehman's subordinate and the time spent with him by Hughes appear to be completely irrelevant. This promotion had no effect on Lehman and this court is aware of no decision anywhere holding that a supervisor cannot talk to any subordinate employee he wants. There is no indication that the warning and the memo indicating that Lehman's job was in jeopardy was not warranted. Lehman, head of the Los Angeles sales office, admitted that in 1982 both his individual sales efforts and the office's efforts fell short of their quotas (¶¶153-157).

There appears to be no dispute that the "below average" performance evaluation was warranted. More impor-

tantly, however, there is no demonstrated nexis between anything Hughes did and the intent, preparation and offering of the early retirement proposal (deposition William K. Hughes, Jan. 24, 1985, pp.11-12, ex.B, reply memo of Society).

Finally, this court again holds that failure of employers to urge their employees not to accept early retirement offers in no way amounts to "intolerability of working conditions" (*Bristow*, 770 F.2d at 1255-1256).

As this court noted in its March 12, 1986 memorandum opinion, the defendant's offer by its terms was voluntarily, in actual practice it proved voluntary; and, in fact, was a part of an overall reorganization of defendant's advertising sales force. Equal Employment Opportunity Commission regulations (29 C.F.R. §1625.9(f)) and the case law (*Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66 (6th Cir. 1982) and *Toussaint v. Ford Motor Co.*, 581 F.2d 812 (10th Cir. 1978)) recognize the validity of voluntary early retirement.

The plaintiffs, as were Henn and Kelly, were salesmen, an occupation subject to pressure performance because one's output is readily measurable by an objective standard. The fact that the plaintiffs felt their jobs to be in jeopardy is not "intolerability of working conditions" but a normal concern of this type of profession, which has never been characterized as a bed of roses. Accordingly, the motion of defendant for summary judgment is granted as to Horan and Lehman.

IT IS SO ORDERED.

/s/ Harry D. Leinenweber
Judge
United States District Court

DATED: SEP 02 1986

APPENDIX E

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

July 2, 1987.

Before

Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*

ROBERT R. HENN, et al.,

Plaintiffs-Appellants,

No. 86-2635 vs.

NATIONAL GEOGRAPHIC SOCIETY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84-C-5125—Harry D. Leinenweber, *Judge.*

ORDER

Plaintiffs-appellants filed a petition for rehearing and suggestion of rehearing en banc on June 22, 1987. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX F

Evidentiary Extracts
from
Brief on Behalf of Plaintiffs-Appellants
(Restated) Filed in the United States Court of Appeals
for the Seventh Circuit on May 15, 1987

* * * * *

STATEMENT OF PERTINENT FACTS

A. *The defendant*

The defendant, National Geographic Society, is a non-profit, federally-chartered, corporation which, among its numerous activities, publishes *National Geographic* magazine. Its principal executive offices are in Washington, D.C. Its principal marketing and advertising space sales offices, for *National Geographic* magazine, are in New York City. It also maintains offices in Chicago, Los Angeles, and other cities, for the purpose of selling advertising space in that magazine.

At the time relevant of this case, Gilbert M. Grosvenor (Washington, D.C.) was President of the National Geographic Society, George E. Moffat (New York City) its Director of Advertising, and William K. Hughes (New York City) was its National Advertising Manager. They were, in that order, the executives immediately above the plaintiffs.

Grosvenor had long been a principal of the National Geographic Society. Moffat assumed his position in November, 1981 (App. 125c).* Hughes was hired in June,

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* References to the Joint Appendix heretofore filed herein are indicated as ("App. ____").

1982, shortly before the event which prompted this action (App. 314)

B. *The plaintiffs, collectively*

The plaintiffs were all older, senior members of the defendant's Advertising Division; Three of them, Henn Horan and Lehman had risen to positions as sales managers with the defendant's *National Geographic* magazine (App. 180, 189, 195) and Kelly was the director of its advertising sales promotion function (App. 203). Henn's offices were in Chicago; Lehman's, in Los Angeles; Horan's and Kelly's, in New York City (App. 220, 222, 224, 226). At the time of the terminations of their employment they had collectively been employed for an aggregate of over 68 years: Kelly, 8 years; Lehman, 16 years; Henn, 21 years; Horan, 23 years (App. 180, 189, 195, 203). All were over 55 years of age (App. 220-226).

By reason of the nature of the plaintiffs' jobs and the relative smallness of the defendant's Advertising Division, there was constant communication and close, ongoing working relationships between and among the members of the Division and their immediate supervisors, the National Advertising Manager (Hughes) and the Director of Advertising (Moffat) (App. passim).

C. *Defendant's June 21, 1983 early retirement "offer"*

On June 21, 1983, Gilbert M. Grosvenor send to each of the members of the defendant's advertising staff "who were approaching retirement, those over age 55", an identical letter outlining an early-retirement program (App. 219-226). The letter states that an offerree's election to accept the early retirement package would be "voluntary."[1] The asserted predicates for the defendant's "re-

[1] The defendant has relied heavily upon its own "voluntary" characterization in claiming that the program was voluntary in this

(Footnote continued on following page)

evaluation of our staffing needs" were "worldwide recession," and "the impact of the economic downturn" shown, for instance, in advertising sales which "have fallen below their expected levels" (App. 219-226).

D. *The background to the defendant's early retirement plan*

Shortly before the defendant's early retirement program was proffered, the defendant had examined the "reorganization of the advertising department" (App. 22-31). Among the "serious problems" it perceived in its study was that:

> "The sales force believes the society is benevolent, the average age is 58 and they expect to paid till age 70" (App. 22).

That analysis, in discussing the subject of the defendant's staff situation, described it in terms of a problem of age, the "graying of our sales staff." (App. 27). Thus is read:

> "*Current Sales Staff*
>
> Of the total twenty sales members one out of two are over 55 years, six are over age 62 and four are presently over age 65.
>
> Only one sales person over 65 plans to retire this year and an undetermined number desire to continue toward age 70.
>
> If an age balance is not struck soon our average age will obviously increase. *Serious repercussions will result if younger sales personnel are not available to cultivate clients in new growth industries and insure future sales.*

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[1] *continued*
case, and the lower court mentions that characterization as a salient element in its March 12, 1986 Memorandum Opinion and Order (App. 16, 19).

> To atract (sic) youthful qualified sales personnel we must be cognizant of industry practices and offer required incentives." (App. 26-27) (emphasis added).

Clearly, in the defendant's view, only "younger sales personnel", not anyone over 55, could be counted on to be able to relate to or "cultivate clients in new growth industries" (App. 26-27). Thus the issue: was the nascence of the defendant's program its own articulated age bias,[2] or, as it claimed in its June 21, 1983 letter to the plaintiffs, the then economic climate.

E. *Defendant's economic condition vs. its "distress" claim*

In its June 21, 1983 letter to the intended retirees, the defendant postulated solely an economic basis for its action: "worldwide recession" and "Here at National Geographic . . . the impact of the economic downturn" (App. 40). In 1983 and the immediately preceding years the defendant had shown, however, astonishing growth in net gains from operations of its *National Geographic* magazine (App. 36-39):

1980	($ 4,637,820)	(loss)
1981	$ 629,256	
1982	$13,799,990	
1983	$23,537,660	

And, so far as advertising sales were concerned, the not-unexpected downturn of 1982 was behind it, and the defendant's 1983 sales rebounded significantly. (App. 124a-125, 167-167a).

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[2] Nowhere in the defendant's analysis of its "problems" is anything said about the over-55 group's (including plaintiffs') lack of demonstrated ability, poor performance, or the like . . . only "age". Only in the pre-termination stages of the program were those seeds sowed, and, afterward, in its defense in this case, was the scythe of performance denigrations taken up by the defendant.

F. *The plaintiffs, individually*

(1) *Robert R. Henn*

Henn was born on May 25, 1924. At the time his employment terminated, he was 59 years old (Def.'s Answer, ¶7). He started as an advertising-space salesman for the defendant's *National Geographic* magazine in December, 1961 (App. 43). He was promoted to Mid-western Manager in June, 1961 (in 1982 re-named Chicago Manager) with overall responsibility for sales in 22 midwestern states (App. 43, 1180). His duties as manager were entirely managerial, and he had no direct sales or account responsibilities (App. 180).

Henn first became aware of the possibility of the defendant's offering some sort of early retirement package a month or so before the June 21, 1983 early retirement notice from the defendant's President. George Moffat told him that he (Moffat) was trying to "get rid of" some salesmen in New York and thought "that was a way to do it" (App. 46). Henn did not construe that as including himself (App. 48). That was his belief when he received the June 21, 1983 notice from Grosvenor later: "When I found out from subsequent events that it did mean me, I was completely surprised, because I planned to be a Geographic for the rest of my working days" (App. 48).

At a meeting with Moffat in mid-July, 1983, Henn asked him whether the defendant wanted him to stay. Moffat said "yes", and he felt reassured (Supp.App.1). Then, the blow, when Henn related his discussion with Moffat to Hughes shortly afterward. Hughes replied: "We might want you to stay, but probably not as manager" (App. 51). This left Henn in a state of shock (App. 51). Pieces started to fall into place; Henn recalled being told that Hughes had said a New York staff meeting earlier in 1983:—"Some of you older guys will not be around at the end of the year" (App. 54).

Henn asked Moffat for a chance to stay and offered to "work the territory", even though, as a manager, he had not been directly involved in selling for years (App. 56).

Moffat replied by stating that he would "talk it over with Bill Hughes and I will get back to you by the end of the month." Moffat never got back to Henn (App. 57). Henn's calls to Moffat went unanswered (App. 72).

Shortly thereafter, Henn learned of a luncheon meeting in Chicago, on July 12, 1983, at which members of his Chicago staff met with Hughes and three key people from the J. Walter Thompson advertising agency. Over lunch, Hughes raised the subject of the defendant's early retirement plan and said openly that none of the persons offered the package was wanted (App. 65).[3]

Bill Hughes's comments[4] finally hit home, and, Henn concluded:

> "the pressure of trying to stay on would have been unbearable" (App. 71).

2. *J. Robert Kelly*

Kelly was born on May 30, 1919. He was hired by the defendant in 1975 as its Promotion Director, the position he had until his employment terminated on August 31, 1983 (App. 203). He officed in New York City and reported to Moffat, the defendant's Advertising Director, during the period relevant to this action (App. 203). His immediate response to the June 21, 1983 early retirement notice and to the claimed "economic downturn" basis was to the point and much faster than Henn's:

> "Q. Do you think that the economic downturn in its effect on advertising sales was unrelated to the offer of early retirement?

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[3] According to the report: "Hughes made it a special point of saying '. . . *this is a young man's business*' " (App. 65).

[4] "We might want you to stay, but probably not as manager" (App. 51); none of the people offered the early retirement plan was wanted (App. 65); "this is a young man's business" (App. 65); "some of you older guys will not be around at the end of the year" (App. 54).

A. Well, I knew that Geographics was enjoying a very good year in total. I felt that this was just a way of getting rid of some of the older people in the organization.

Q. Was that your immediate reaction when you received the letter?

A. Yes. More or less said to myself, "My God, they figured out a way to do it." (App. 75).

He had a reason for his foreboding. Moffat had previously mentioned retirement or freelance work (App. 80). Being in the defendant's New York City office, he had witnessed Hughes' "chopping up" of the other older employees (App. 80). He wanted to stay and to reject the early retirement offer (App. 83). As with Henn, Kelly was stonewalled (App. 83-84).

3. *Robert W. Horan*

Horan began his career with the defendant's *National Geographic* magazine in July, 1960 as an advertising-space salesman (App. 88, 189). Five years later, in 1965, he was promoted to the position of Travel Advertising Manager (App. 88). In 1967, after briefly being named the defendant's Assistant Eastern Advertising Manager, he was promoted to the position of Canadian Advertising Manager (App. 89). In 1979 he was again promoted, to the position of International Advertising Manager (App. 89). Then, in January, 1982, he was suddenly and without explanation demoted to being a salesman (App. 90, 190). He was assigned accounts which advertised exclusively on television, had never before advertised in *National Geographic* magazine, were only regional advertisers, or only advertised on a "trade-off" basis (i.e.—traded their goods or services for advertising space), and even one which was suing the defendant (App. 92-94). Of the 89 accounts assigned to him, 85 were non-active accounts (App. 92, 119-120). That was aggravated by the fact that the cultivation of a decent prospect typically takes one to one-and-one-half years to develop into an advertising account (App.

121). That action by the defendant was complemented by Horan's immediate supervisor, Hughes[5] telling him: "The trouble with you is that you have been around too long" (App. 93). Horan, who was sixty years old, read that as: "I took it strictly as an age situation. I was getting too old to handle it. That's the way I took it" (App. 94-95). Shortly after that (Horan recalled it as being February or March, 1983), Hughes, in addressing a sales staff meeting at which Horan was present, said that "some of you with longevity" may not/probably won't be around in June. (App. 94-95). Horan and the others "took it as meaning age" . . . "like 'you old guys, you may not be around in June.' " (App. 96). The atmosphere, according to Horan, was becoming permeated with the "feeling given by management in New York that the oldtimers ought to take a walk" and by the young people being favored (App. 97).

Not only Hughes, but also Moffat added his own fuel to the fire. At a lunch meeting in February, 1983, Moffat broached the subject of his leaving: "Bob, what do you think about—would you be interested in early retirement?" Horan's response was direct and negative: "I couldn't even consider it unless I was a millionaire. I am not financially able to do anything like that, even if it were offered" (App. 100-101).

Interspersed throughout this period was "a deluge of nasty memorandums," from Hughes to Horan, who in his long career "had never seen anything like it." These from someone who was but a few feet away from Horan, but who felt compelled to make a record (App. 121-124).

Then came the early retirement letter from Grosvenor, in June, 1983. When he first saw it, Horan, as did Henn, still did not immediately read it as being addressed to him personally ("it couldn't be me") (App. 103). But, as he later realized: "It says 'voluntary', but sometimes you got to read between the line" (App. 103).

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[5] Hughes, the "hatchet man." (App. 143, 144, 155).

Horan still had a lingering hope that it was just a nightmare, that somebody in management would tell him they would like him to stay aboard, just as they did with one of the other over-55's, Fryda Ehrlich (App. 105-106).

From the time he received the Grosvenor "offer" notice, through July and August, 1986, Horan went from disbelief to being dazed and finally shunned by not only Hughes but other Advertising Division staff members (App. 107-109).

Finally, Horan made one last, eleventh-hour stab at finding out whether he had any future at all with the defendant:

> "During this nightmare period on (August) 31st, I went in to see Mr. Moffat, asked if I could sit down and talk to him for a little while.
>
> He said, "Come on in." I sat down, he stood up. I said, "George, you know, we are right down to the last day, and I really would like to have some type of communication," maybe not my exact words to him, "I don't want to leave, I would like to stay."
>
> And I kind of know what I was going to do then. I was waiting for his answer.
>
> And he said again, "It is your decision."
>
> I said, "Okay, I will go down to Washington this afternoon and resign. I will take it, terminate my services here with your early retirement."
>
> He asked me to give him a memo, and also told him I had some very important unfinished business with the Canadian Government Office of Tourism in Ottawa. I would be very happy to continue with it, if he would give me the month of September as a consultant, or whatever.
>
> He said, "No, I will give you two weeks" (App. 111).

Horan summed-up his conclusion from everything that had happened to him:

"I finally realized at this point that my age was against me and I had to get out of there because they were going to get rid of me one way or the other" (App. 112-113).

(4) *Richard H. Lehman*

Lehman was employed by the defendant in July, 1967 as an advertising space salesman for its *National Geographic* magazine in Los Angeles (App. 125a, 195). He was promoted in 1976 to the position of Los Angeles Regional Manager (App. 125c).

Lehman's record was one of considerable success. During the ten years in which the defendant had established sales quotas, he had missed exceeding his assigned quota in only two years, in the first year and in 1982, which was an "abberation."[6] (App. 142). In 1983, as Lehman had predicted to Hughes, things were whizzing along and he made his quota. As Lehman said: "in '83 we rebounded. We came back like gangbusters. The office made its quota . . . I made mine" (App. 125e).

Then came Hughes, to do his job on Lehman, a man who "had spent sixteen years with the National Geographic with an outstanding sales and management record" (App. 143). As for Hughes, Lehman described his experiences with him succinctly:

"There was nothing to please him" (App. 144).

The record demonstrates an uninterrupted flow of denigrations on the part of Hughes toward Lehman:

(a) Lehman was informed, in January, 1983, that Hughes wanted Lehman's young subordinate to replace him as the defendant's Los Angeles Regional Manager. Hughes even told that individual, Bob Johnson, with

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[6] Even Grosvenor, the defendant's President, had predicted in 1981, "a bad year in 1982" (App. 125d-125e) which is exactly what happened everywhere.

whom he spent most of his time when he was in Los Angeles, that he wanted to make him manager of the Los Angeles office[7] (App. 129-134). This inexplicable back-stabbing effort and the undercutting of Lehman's managerial position was followed by other and worse actions by Hughes.

(b) Hughes continuously by-passed Lehman and communicated directly with Lehman's subordinate, Bob Johnson, a management slight of very meaningful significance in the business world, which seriously affected Lehman's ability, as Manager, to direct the work of that individual (App. 135-140):

> ". . . at this juncture Bill Hughes was communicating directly with Bob and bypassing me and undermining me as manager.
>
> Bob was getting the attitude where he tolerated me, and that his real sponsor or mentor was Bill Hughes. So he just sort of ran off to do his own thing . . ."

This, however, was but a prelude to the treatment Lehman got from Hughes at retirement time grew closer.

(c) On March 18, 1983, Hughes sent Lehman a "pre-discharge" memo warning him about sales performance (App. 140-141).

(d) Shortly thereafter, on May 23, 1983, Hughes sent another memorandum to Lehman, stating, that Lehman's job was "in jeopardy" (App. 145-146). This in a year of his accurately-predicted success, but less than a month before the defendant's resignation proposal. Lehman's reaction:

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[7] The lower court (Memorandum Opinion and Order, September 2, 1986, App. 13) held: "The promotion of Lehman's subordinate and the time spent with him by Hughes appears to be completely irrelevant. This promotion had no effect on Lehman and this court is aware of no decision anywhere holding that a supervisor cannot talk to any subordinate employee he wants." Hughes' *right* to do so is not questioned; its being a calculated slap in the face to Lehman *is* indeed relevant in the demonstration of the deterioration of Lehman's work situation.

"I almost went to the doctor when I got that. That was a very stressful letter to receive and I damn near went into shock. My job in jeopardy after sixteen years with this company" (App. 147).

It was manifestly, as Lehman said:

"a designed program to make me unhappy" (App. 148).

(3) After he received Hughes' job-in-jeopardy letter, Lehman went to New York to meet with his and Hughes' boss, Moffat. They met over lunch:

". . . I was thoroughly distressed and distraught, and I am saying, "George, what in the hell is going on with Hughes? Why are you guys trying to fire me."

And to this I got no answer.[8]

So George and I sat through lunch, and he said, "Dick, you are a fabulous salesman, you are fantastic, you are great, you are this, you are that, why don't you think of something else, maybe what you would like to do at Geographic is like being the public relations director in Washington, D.C., or maybe you would like to be a photographer, because you are a fantastic photographer" (App. 149).

(f) On June 2, 1983, Hughes sent Lehman his performance evaluation. He rated Lehman "below average" (App. 152-156). The context within which this was done demands some examination. Significantly, the timing of the evaluation was totally inconsistent with the defendant's past practice of giving evaluations around the first of September (App. 152-154). Then, just before the defendant's Grosvenor sent out his early retirement notice, and in the midst of the rebounding, "gangbusters", year of 1983, Lehman was given a devastating evaluation.

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[8] A silence which was to Lehman more telling than any words (See App. 170).

Lehman's response to the evaluation:

> "I literally just shook my head and said, 'One more nail in the coffin.' And in nine months I had come from being a marvelous guy with the agencies to a bum who couldn't find his way around town . . .
>
> . . . Here is the hatchet man. The hatchet man started, and we have already gone through this litany of the things that he has done. Here is the final stroke, a few days before this offer is going to be made, when we are all at our low point, asking 'What is happening to me with all the years I put in with this magazine?'
>
> And this is psychological warfare, is what it is. Beat you down so you will take anything, knowing the alternative is not worth a damn" (App. 154-155).

(g) In the late summer of 1983, still seeking some kind of reassurance, Lehman spoke to Grosvenor, the defendant's President, and to Moffat. He met only a frustrating silence. As Lehman described it:

> "The final coercive act was really no act at all. It was the apathy and silence on the part of Moffat and Grosvenor" (App. 174).

Lehman left and was replaced by his former subordinate, Bob Johnson (App. 176).

G. *The plaintiffs, a summary*

The specifics of the plaintiffs' respective experiences were individual and naturally varied, but a common theme and character is shown by the evidence. All were older, experienced, long-time, senior-level members of the defendant's Advertising Division. All were confronted by a suddenly accelerating surge of negative experiences in the period just before the early retirement offer, which continued until they were gone. They were demeaned and shunned by superiors, peers and subordinates alike, told they were not wanted, threatened (however veiled) with

demotion and/or discharge and lived and worked in an environment which had suddenly, they felt, become poisoned with fear, suspicion and humiliation.

* * * * *

APPENDIX G

Evidentiary Extracts
from
Petition for Rehearing with Suggestion for Rehearing In Banc Filed by Plaintiffs-Appellants in the United States Court of Appeals for the Seventh Circuit on June 22, 1987

* * * * *

The "encouragement" included, for example:

(a) *Threats.* Defendant's Hughes to plaintiff Henn when the latter inquired about his future if he didn't accept the offer: "We might want you to stay, but probably not as manager" (Appellants' Brief, Restated, p. 10, App. 51, Supp.App. 1). Hughes to Lehman: "your job is in jeopardy" (Appellants' Brief, Restated, p. 18, App. 145-146). Hughes to sales staff in early 1983: "Some of you older guys will not be around at the end of the year" (Appellants' Brief, Restated, p. 11, App. 54).[14]

(b) *Public humiliation.* Hughes to members of plaintiff Henn's staff and key people from the J. Walter Thompson advertising agency, at a public-place luncheon: "everyone offered this plan was not wanted" (Appellants' Brief, Restated, p. 11, App. 65).

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[14] The timing of that job-in-jeopardy threat is critically relevant, made as it was when it could be accurately stated by Lehman: "in 1983 we rebounded [from the defendant-characterized, across-the-board, "bad year in 1982"]. We came back like gangbusters. The office made its quota . . . I made mine" (Appellants' Brief, Restated, p. 16, App. 125d-125e).

(c) *Age-related slights.* Hughes: "this is a young man's business" (Appellants' Brief, Restated, p. 11, App. 65). Hughes to staff: "like 'you *old* guys, you may not be around in June' " (Appellants' Brief, Restated, pp. 13-14, App. 94-97). Not: "you non-performing guys."

(d) *Personal denigrations.* Defendant's Moffat to plaintiff Lehman in mide-1983: "Dick, you are a fabulous salesman . . . why don't you think of something else . . . maybe you would like to be a photographer." (Appellants' Brief, Restated, p. 18, App. 149). Hughes' by-passing of Lehman and in early 1983 his telling Lehman's subordinate that he (Hughes) wanted to make him to be the Los Angeles manager, replacing Lehman. Plaintiff Horan's being treated like he "didn't exist" (Appellants' Brief, P. 15, App. 109).

(e) *Pointed non-responsiveness.* Plaintiff Henn's calls to defendant's Moffat went unanswered (Appellants' Brief, Restated, p. 11, App. 72). Plaintiffs Lehman's and Horan's questions were met with silence (Appellants' Brief, Restated, p. 15, 18, 19, App. 111, 170, 174).

(f) *Flurries of unprecedented memos.* Hughes to plaintiff Horan (Appellants' Brief, Restated, p. 14, App. 121-124). Hughes to the defendant—described "fabulous salesman", plaintiff Lehman, during Lehman's "gangbuster", quota-meeting year of 1983, warning and job-in-jeopardy notices (Appellants' Brief, p. 17-18, App. 140-141, 145-149).

* * * * *